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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. JOSE LUIS TORRES, Defendant and Appellant.	B169647 (Los Angeles County Super. Ct. No. BA241361)

APPEAL from a judgment of the Superior Court of Los Angeles County, Barbara R. Johnson, Judge. Affirmed in part, reversed in part and remanded.

Valerie G. Wass, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Linda C. Johnson and James William Bilderback II, Deputy Attorneys General, for Plaintiff and Respondent.

This case raises the issue of whether a conviction of attempted voluntary manslaughter can be based on conscious disregard for human life rather than specific intent to kill. We agree with recent appellate decisions that specific intent is required, and reverse appellant Jose Luis Torres's conviction of attempted voluntary manslaughter.

FACTUAL AND PROCEDURAL BACKGROUND

Information

Appellant was charged by information with the crimes of attempted "willful, deliberate, premeditated" murder, assault with a firearm, and possession for sale of cocaine base. With respect to the first charge, it was further alleged that appellant personally used or discharged a firearm within the meaning of Penal Code section 12022.53, subdivision (d), and with respect to the second charge, that he personally used a firearm within the meaning of Penal Code sections 12022.5, 1192.7, subdivision (c), and 667.5, subdivision (c). Appellant pled not guilty.

Evidence at Trial

Deborah Precella, the victim and appellant's ex-wife, testified that she and appellant were married in March 2002, and moved to the apartment where the incident occurred after five or six months. It was one room with a shared kitchen and bath located elsewhere in the building. During their marriage, appellant exhibited jealousy and threatened to kill Precella if he ever caught her with anyone else. In November 2002, they split up. Precella moved out of the apartment and went to stay with her adult daughter, Desiree Quevado. Quevado lived in the same building Precella had lived with appellant, right next to appellant's apartment. Precella's sisters, Bertha and Dannett, also lived in the building. Appellant and Precella made an unsuccessful attempt to get back together at one point. Precella had prior convictions for possession of a switchblade and being under the influence

of drugs. She spent time in county jail for violation of house arrest. At some point, Precella moved out of the apartment building and went to live with her mother in Montebello.

On December 18, 2002, Precella was visiting her daughter Quevado. Appellant called for her to come over, offered her a shrimp cocktail, and asked whether she was seeing anyone. Precella told him "no." They also smoked a joint laced with PCP. Appellant went out, leaving Precella alone in the apartment. Precella got some Christmas cards she had left in a box in the closet and went to her sister Bertha's apartment. Precella saw appellant return with a gun in his waistband and an 18-pack of beer. She heard that appellant was looking for her, and went to see what he wanted. She returned to the closet to get more Christmas cards. Appellant pushed her against the wall and asked what she was doing. When she reached for her box on the closet shelf, he reached past her and got a gun. It was under a blue towel. They started struggling. Precella asked him whether he was going to shoot her, and he shot her in the stomach.

Precella was in the hospital until January 3. She told the officer who first interviewed her that the shooting had been an accident. She testified that she told the officer that because she was scared of appellant. Later, Precella told the officer it was not an accident.

Precella further testified that she saw appellant sell marijuana and rock cocaine in the past.

Quevado testified that an hour after Precella left to see appellant, she heard a gunshot. She also heard someone screaming "[h]e shot me" and "[h]elp me." Quevado looked outside her door and saw appellant running to his friend's apartment. Quevado saw appellant give his friend something covered up in a towel. Appellant's friend went back into his apartment. A few moments later, he emerged, told Quevado that her mother was hurt, and went downstairs as if to leave the building. He might have been carrying something.

Quevado told her friend to go see what happened. Quevado's friend reported that Precella had been shot. Quevado went to tell her aunts to get help rather than doing anything herself because Quevado "didn't want to see [Precella] . . . on the floor shot." Quevado overheard her aunt ask appellant why he shot Precella. She saw people going into appellant's apartment and heard someone say "[g]et off of her." On cross-examination, Quevado admitted she had never made a statement about the incident to police officers or the district attorney, or spoken to any official about the shooting until the trial.

Officer Anthony Razo responded to a call about the shooting. The call indicated a possible suicide. He arrived after the paramedics. He heard appellant say, "Baby, why did you shoot yourself?" Appellant told the officer that he had been at the store when Precella was shot. According to appellant, when he heard from an unknown boy that his wife or girlfriend shot herself, he returned to the apartment and grabbed Precella just as she fell to the ground. Officer Razo asked appellant where the gun was. At first appellant said he did not know and then said it was on the floor. A test was administered to appellant to see whether he had fired a gun. No gunshot residue was found. At one point, however, officers told appellant that the test was positive in order to induce a confession. No such test was administered to Precella.

Officer Razo and his partner searched the apartment, and found three baggies of what appeared to be rock cocaine and a substance that appeared to be marijuana in the closet.[1] Later it was determined that there were 30 grams of cocaine and 60 grams of marijuana. Also found in the closet were gram and ounce scales, a .25 semiautomatic gun, ammunition for the gun, Ziploc bags, disposable lighters, straight edge razor blades, and $715 in cash. There were also items belonging to Precella in the closet. In the officer's opinion, the amounts of

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[1] An expert later testified that the substances were indeed what they appeared to be.

narcotics found indicated they were being held for sale. In addition, sellers often have scales, razor blades, and disposable lighters.

Challenged Jury Instruction

After reviewing the instructions proposed by counsel, the court sua sponte decided to include an instruction on attempted voluntary manslaughter because it was a lesser included offense warranted by the evidence. The jury was instructed: "The crime of attempted voluntary manslaughter is lesser to that of attempted murder charged in count 1. . . .

"Every person who attempts to unlawfully kill another human being without malice aforethought but either with an intent to kill, *or in conscious disregard of human life*, is guilty of attempted involuntary [*sic*] manslaughter in violation of Penal Code section 664/192[, subdivision] (a). There is no malice aforethought if the killing occurred upon a sudden quarrel or heat of passion. '*Conscious disregard for life,' as used in this instruction, means that a killing results from the doing of an intentional act, the natural consequences of which are dangerous to life, which act was deliberately performed by a person who knows that his or her conduct endangers the life of another and who acts with conscious disregard for life*. In order to prove this crime, each of the following elements must be proved: 1. A defendant attempted to kill a human being; 2. The attempted killing was unlawful; and 3. The perpetrator of the attempted killing either intended to kill the alleged victim, *or acted in conscious disregard of life*; and 4. The perpetrator's conduct resulted in the attempted unlawful killing. An attempted killing is unlawful, if it was neither justifiable nor excusable." (Italics added.)

The jury was also instructed that for attempted murder, the following elements must be proved: "1. A direct but ineffectual act was done by one person towards killing another human being; and 2. The person committing the act

harbored express malice aforethought, namely, a specific intent to kill unlawfully another human being."

Closing Argument

The prosecutor argued in closing that in order to find attempted murder, the jury would have to find that appellant "ma[d]e a direct but ineffectual act to kill another human being" and "did . . . so with an express malice" which the prosecution defined as "did he have the intent in his head to -- specific intent to kill her, to kill [Precella], another human being." Later, the prosecutor stated: "[o]ne of the main differences between the assault and the attempted murder is . . . in attempted murder, the defendant has to have specific intent." In explaining appellant's possible motive for attempted murder, the prosecution stated: "Well, why [try to kill her] now? He's got jealousy. He expressed jealousy from the beginning, at the time they got together, and then throughout the relationship." Describing the crime of attempted voluntary manslaughter, the prosecutor stated: "The only way you can get to attempted involuntary [*sic*] manslaughter, and it will be in the instructions, is that you find that he did commit the attempted murder, but it was justified in some way. Sudden quarrel or self defense."

Verdict and Sentencing

The jury found appellant not guilty of attempted murder, but did find him guilty of attempted voluntary manslaughter, assault with a firearm, and possession for sale of cocaine base. It also found true that he personally used a firearm.

The court used the assault conviction for the base count, and sentenced appellant to seven years in state prison--the midterm of three years plus four years for use of a firearm. On the attempted manslaughter count, the court sentenced appellant to the midterm of three years, but stayed the sentence under Penal Code section 654. On the possession charge, the court sentenced appellant to 16 months

to run consecutively to the seven-year sentence on the base count, for a total commitment of eight years and four months. This appeal followed.

DISCUSSION

I

Appellant contends that the trial court erred in giving an instruction that informed the jury that they could convict of attempted voluntary manslaughter without evidence that appellant harbored a specific intent to kill Precella, that such a conviction could rest instead on a finding of conscious disregard for human life. Two recent appellate decisions, dated after the trial in this matter, have said that attempted voluntary manslaughter cannot be based on conscious disregard: *People v. Gutierrez* (2003) 112 Cal.App.4th 704 and *People v. Montes* (2003) 112 Cal.App.4th 1543.

In *Gutierrez*, defendant's position was the opposite of appellant's here. Defendant claimed that the trial court erred in *not* sua sponte instructing the jury concerning attempted voluntary manslaughter "on the theory defendant may have acted with a conscious disregard for life, but without intent to kill." (112 Cal.App.4th at p. 709.) Defendant cited *People v. Lasko* (2000) 23 Cal.4th 101, 108, where the Supreme Court held that a person who acts with a conscious disregard for life kills a human being during a sudden quarrel or in the heat of passion commits voluntary manslaughter, and *People v. Blakeley* (2000) 23 Cal.4th 82, 85, where the court held voluntary manslaughter is committed when a defendant "acting with conscious disregard for life and the knowledge that the conduct is life-endangering, unintentionally but unlawfully kills while having an unreasonable but good faith belief in the need to act in self-defense."

The Court of Appeal in *Gutierrez* held that in attempting to rely on *Lasko* and *Blakeley* "as authority for an attempted voluntary manslaughter instruction based on conscious disregard," defendant "misses a fundamental point. An *attempt*

to commit a crime requires a specific intent to commit the crime. (Pen. Code, § 21a.) This is true 'even though the crime attempted does not [require a specific intent].'" (112 Cal.App.4th at p. 710, quoting 1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Elements, § 53.) Accordingly, the court concluded that the trial court did not err in failing to give an attempted voluntary manslaughter instruction based on conscious disregard where neither provocation or heat of passion was shown by the evidence. (*Gutierrez*, at pp. 709-710.)

The court addressed the issue presented by the present case directly in *People v. Montes*, *supra*, 112 Cal.App.4th 1543, where the trial court had instructed the jury that attempted voluntary manslaughter could be committed where the perpetrator acts "'in conscious disregard for life.'" (*Id*. at p. 1546.) The court began with a discussion of the authorities holding that voluntary manslaughter, like murder, can be committed either with specific intent or with conscious disregard for human life. (*Id.* at pp. 1547-1548.) The difference is that a person "'who *intentionally* kills as a result of provocation, that is "upon a sudden quarrel or heat of passion," lacks malice and is guilty not of murder but of the lesser offense of voluntary manslaughter.'" (*Id.* at p. 1548.) "'[A] killer who acts in a sudden quarrel or heat of passion lacks malice and is therefore not guilty of murder, irrespective of the presence or absence of an intent to kill. Just as an unlawful killing *with* malice is murder regardless of whether there was an intent to kill, an unlawful killing without malice (because of a sudden quarrel or heat of passion) is voluntary manslaughter, regardless of whether there was an intent to kill. In short, the presence or absence of an intent to kill is not dispositive of whether the crime committed is murder or the lesser offense of voluntary manslaughter.'" (*Id.* at p. 1549.)

Then the court reviewed the numerous cases holding that "[n]otwithstanding the fact that murder may be committed without an intent to kill, it has long been held that the crime of attempted murder does require an intent to kill." (*Montes*, at

p. 1549.) In other words, "[o]ne who shoots and kills without an intent to kill, but with conscious disregard for life and not in the heat of passion, can be guilty of murder. [Citation.] But one who acts with this very same mental state, and shoots but does not kill, cannot be guilty of attempted murder. This is because attempted murder requires an intent to kill." (*Id.* at p. 1550.)

The court concluded that the same rule should be applied to attempted voluntary manslaughter: "[i]f the crime of attempted murder requires a specific intent to bring about a desired result (the killing of a human being), then it appears to us that the crime of attempted voluntary manslaughter must also require a specific intent to bring about that same desired result (the killing of a human being)." (*Id*. at pp. 1549-1550.) Accordingly, the court held that the instruction given was erroneous since it permitted the jury to convict of attempted voluntary manslaughter if they believed the defendant acted with conscious disregard, but no specific intent to kill.

Respondent does not attempt to persuade us to diverge from the holdings in *Montes* and *Gutierrez*. Instead, respondent insists that the error in instructing the jury that it could convict appellant if it found that he engaged in conduct, which showed a conscious disregard for life, was harmless. We are not persuaded. The jury clearly believed that appellant shot Precella, rejecting the defense suggestion that she somehow shot herself. But, according to the undisputed evidence, the wound was in Precella's stomach, although appellant was shooting from point blank range and could easily have directed the gun toward her head or chest. From the fact that Precella was shot in an area where a bullet wound is not necessarily fatal, the fact that only one shot was fired, and the fact that Precella was screaming loudly enough for Quevado to hear her after the shooting occurred, the jury could have believed that appellant shot Precella without caring whether she lived or died, as when an arsonist lights a fire not caring whether bystanders are injured or killed.

Respondent contends that "there was no argument [by trial counsel] that appellant shot [Precella] with conscious disregard" and that "the only time attempted voluntary manslaughter was mentioned, the prosecutor made it clear to the jury that, under the facts of the instant case, it would only apply if the jury believe appellant 'did commit the attempted murder, but it was justified in some way. Sudden quarrel or self defense.'" As we have seen, however, in attempting to distinguish between the counts charged, the prosecutor repeatedly told the jury that attempted murder required a finding that appellant had "specific intent" to kill Precella. The prosecutor also stated that appellant acted out of "jealousy" and that it could find attempted voluntary manslaughter if the shooting arose out of a "sudden quarrel." The jury could reasonably have come to the conclusion from the prosecution's argument and the erroneous instruction that if appellant acted *without* specific intent to kill Precella but *with* conscious disregard of whether she lived or died, he was guilty of attempted voluntary manslaughter. The conviction of attempted voluntary manslaughter cannot be affirmed.

II

Appellant additionally contends that the conviction for assault with a firearm must be reversed because the testimony of Precella and Quevado was "unbelievable" and "suspect" and no rational jury could have relied on it. Appellant points out that Precella had a prior felony conviction, admitted lying before, and acknowledged getting high on PCP prior to the shooting. Quevado did not come forward until a day before her trial testimony.

Appellant's theory is a novel one, particularly with respect to Quevado. We are aware of no authority for the proposition that witnesses who come forward just prior to trial cannot be credible. As for Precella, her deficiencies as a witness were known at trial and addressed extensively in cross-examination and in defense

counsel's closing argument. The jury chose to believe her despite her PCP-induced intoxication and her turnaround on how the shooting transpired.

"""Although an appellate court will not uphold a judgment or verdict based upon evidence inherently improbable, testimony which merely discloses unusual circumstances does not come within that category. [Citation.] To warrant the rejection of the statements given by a witness who has been believed by the [trier of fact], there must exist either a physical impossibility that they are true, or their falsity must be apparent without resorting to inferences or deductions. [Citations.] Conflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.]""" (*People v. Barnes* (1986) 42 Cal.3d 284, 306.) There is no basis for outright rejection of either Precella's or Quevado's testimony.

DISPOSITION

The conviction of attempted voluntary manslaughter is reversed. The judgment is affirmed in all other respects. The matter is remanded for further proceedings consistent with this opinion.

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CURRY, J.

We concur:

EPSTEIN, Acting P.J. HASTINGS, J.